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DETAINING OUTSIDE OF WAR: HOW LEGAL AMBIGUITY LEADS TO POLICY PARALYSIS

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Exercice Solo Flight

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DETAINING OUTSIDE OF WAR: HOW LEGAL AMBIGUITY LEADS TO POLICY PARALYSIS

INTRODUCTION

The detention and internment of prisoners during armed conflict presents a wicked problem to military and civilian leaders. In the cleanest of circumstances, it is governed by international laws and practice designed to prevent the atrocities of the Second World War; laws and practice that provide guidance and assurances to planners. In fact, for many nations the existing law and procedures seem sufficiently robust, so as to negate any sense of controversy or confusion when engaged in traditional international armed conflict.¹ However, Canada rarely operates anymore within the neat confines of traditional international armed conflict. Recent military history has shown that outside of the straight forward world of state-on-state warfare, there is sufficient ambiguity to allow widely different strategies and methods of conducting detention operations of enemy combatants. Emerging security and military trends, threats, and doctrines are likely to spread that ambiguity to not just non-international armed conflict, but to all manner of military intervention. As a consequence, Canada ought to be ready with good policy, well trained troops, and political will to respond to the detention issue, or potentially face strategically damaging consequences ranging from political fallout to lawsuits and criminal convictions. The question posed by this paper is: is Canada prepared?

In spite of the political and reputation impacts of Canada's experiences with detention in Afghanistan and Somalia, Canada has not adapted to the realities of taking prisoners in a modern military intervention. Further, this failure is not a coherent

¹ Bruce Oswald and Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations," *Nordic Journal of International Law* 83 (2014): 141, doi: 10.1163/15718107-0832002.

government policy that aligns its diplomatic and military practice, as it is with the United States, but shows inertia and problem avoidance on the part of the Canadian Armed Forces; as well as a hesitancy to confront the detention environment as it is. This paper will examine some of the most politically damaging detention controversies coming out of Canada's recent military past, and the lessons it ought to have learned. It will then analyse the contemporary context: from emerging security trends and threats to the state of international law. Finally, it will evaluate whether or not Canada has adapted to either of these facts in its current approach to training and planning for detention on operations.

BACKGROUND: ABU GHRAIB, TORTURE, AND TRANSFERS

Controversial policy and the high profile scandals of the global war on terror have generated an increased debate surrounding detention and international law in NATO armed forces.² That is not to suggest that prior to the news breaking on Abu Ghraib abuses, or the Canadian Federal Court decision on detainee transfers, that there was insufficient international law governing the treatment and internment of combatants and civilians detained during military operations.³ But they were built for traditional industrial warfare between nations and allowed sufficient manoeuvre room in the global war on terror for new rhetoric, interpretations, and deviations. NATO countries used this room prosecute an 'efficient' war while continuing to claim the moral high ground on illegal fighters. Human rights challenges and inquiries into the treatment of detainees during the global war on terror, and the political and military resistance to such challenges have highlighted that the operational environment had changed in ways that military thought had not matched. An examination of first the American, then the

² *Ibid*, 128-129.

³ Diane M. Amann, "Abu Ghraib," *University of Pennsylvania Law Review*, 153 (2005): 2120.

Canadian, challenges in this arena is helpful to understand the similarities and unique challenges faced by the detention regimes adopted by their respective armed forces. It will also inform the analysis on whether or not useful lessons were learned. This section will review first the circumstances and decisions surrounding prisoner abuse at Abu Ghraib and Guantanamo Bay, then examine Canadian transfers to the Afghan National Directorate of Security (NDS).

The September 11, 2001 attack on the United States was shocking, and while international terrorism was not new, a terror attack of this scale had never been successfully carried out on US soil. It ushered in a new era of rhetoric and ideas about war, and significant administrative and legal effort went into framing the enemy in new ways.⁴ The way in which the enemy was framed, in both media and through official communications, set not just the tone, but the structure of US detention policies in the early war years. The assertion was that the cold-war organization for detention operations, with its industrial age structures, procedures, and rules was not adequate for the “new kind of war.”⁵ The Bush administration declared that Al-Qaeda and Taliban forces were not entitled to status as prisoners of war, brushing off the requirement to determine their status through an independent tribunal. In fact they would go further and suggest that industrial age rules for the handling of prisoners were “quaint” or “obsolete.”⁶ What resulted was a system where captured fighters were detained on the battlefield for a number of reasons – including security grounds - and retained in custody based largely on their intelligence value - as determined through administrative military

⁴ Guy Adams, Danny Balfour, and George Reed, “Abu Ghraib, Administrative Evil, and Moral Inversion: The Value of “Putting Cruelty First,” *Public Administration Review* 66 no. 5 (2006): 684.

⁵ *Ibid.*, 684.

⁶ Adam Lankford, “Assessing the Obama Standard for Interrogations: An Analysis of Army Field Manual 2-22.3,” *Studies in Conflict and Terrorism* 33, No 1 (2009): 24, doi: 10.1080/10576100903400555.

panel. They would then potentially be subjected to rendition to third locations or third parties where they could be detained until they were ‘no longer considered enemy combatants.’⁷ Also relevant was the approval and use within detention centers of ‘enhanced interrogation techniques,’ which some have since argued amount to cruel treatment and even torture.⁸ This mistreatment was not only the product of sadistic guards venting fear and frustration in an active war zone, but included systematic practices as part of the intelligence production policy in effect.⁹

Several decisions by the administration contributed to the structure of their detention policy, and the abuse meted out in detention facilities across Iraq, Afghanistan, and Cuba. Perhaps the first, and most consequential, decision was prioritizing intelligence gathering in its conduct of the global war on terror.¹⁰ There was a sense, played out in the media, that an intelligence failure had led to the September 11 attacks.¹¹ More quality intelligence would be required not just to prevent a future attack, but also to degrade Al Qaeda and their Taliban allies, and to operate in areas of the world where the U.S. had limited presence or knowledge. From this decision many of the structural and behavioural features of the U.S. detention policy would follow. First, the U.S. enemies in AQ and the Taliban couldn’t be granted prisoner of war status, as this would have precluded under international law the kind of intelligence exploitation that was viewed as essential to the war effort. Second, the system favoured long term to indeterminate detention to allow for continuous intelligence exploitation, which arguably accounts for the preference for the

⁷ Aziz Huq, “The President and the Detainees,” *University of Pennsylvania Law Review* 165, No. 3 (2017): 525.

⁸ Diane M. Amann, “Abu Ghraib,” 2085-2090.

⁹ Janis Karpinski and Steven Strasser, *One Woman’s Army: The Commanding General of Abu Ghraib Tells Her Story*, (Newark: Audible, 2005), chapter 8.

¹⁰ United States, Department of Defence, *Investigation of the 800th Military Police Brigade*, report prepared by MGen Antonia M. Tabuga, Washington: U.S., 2004, 38.

¹¹ “9/11 commission faults U.S. intelligence.” *CNN.com*, May 19, 2004.

U.S. rendition of prisoners to Guantanamo. This was aided by framing the nature of the conflict very quickly as a non-international armed conflict. Third, the multi-national nature of the force assembled to prosecute the wars in Iraq and Afghanistan couldn't be allowed to restrict U.S. access to sources of intelligence, and so transfers needed to be normalized.¹²

Less deliberate, but equally consequential, outcomes followed from the framing of Al Qaeda and Taliban fighters as 'illegal combatants.' Beyond enhanced interrogation techniques, inmates were subjected to a number of indignities and abuses that had little or nothing to do with intelligence extraction.¹³ By setting up a new detention policy to accommodate the updated intelligence goals of the global war on terror, the U.S. military weakened the structures designed to protect against some of the enduring challenges in managing human violence. Demonstrated repeatedly in the real world and through experimentation, in positions of unequal power, unless tightly controlled by systems of internal discipline, human beings are prone to dehumanize and abuse the 'other.'¹⁴ Interestingly, it was the public exposure of many of these seemingly senseless abuses from Abu Ghraib that exposed the more systematized transfer and mistreatment of intelligence prisoners to the scrutiny of critics.¹⁵ The abuse within the system, both

¹² Lawrence Hill-Cawthorne, "The Copenhagen Principles on the Handling of Detainees: Implications for the procedural regulation of internment," *Journal of Conflict and Security Law* 18, No 3 (2013): 496, doi: 10.1093/jcsl/krt015

¹³ Michelle Brown, "Setting the Conditions for Abu Ghraib: The Prison Nation Abroad," *American Quarterly* 57 no. 3 (2005), 989.

¹⁴ Adam Lankford, "Assessing the Obama Standard for Interrogations: An Analysis of Army Field Manual 2-22.3," 23.

¹⁵ Christopher Graveline and Michael Clemens, *The secrets of Abu Ghraib Revealed* (Washington D.C.: Potomac Books, 2010), p.9.

systematic and deviant, was at the core of the problematic policy decisions made by Canada in designing their detention policy for Afghanistan.

Canada's policy throughout their participation in the Afghan conflict was to transfer, as quickly as possible, any detainees to another authority.¹⁶ The majority of criticism of this policy involved Canada transferring captured fighters into jurisdictions where they would be subject to torture or abuse.¹⁷ There were several reasons driving these policy decisions. Firstly, NATO policy was to hold detainees no more than 96 hours.¹⁸ Although Canadian officials have the ability to influence NATO, within coalition operations this policy provides a higher level command restraint which can bind decisions and serve as a rationale for some Canadian detention decisions. Secondly, the previously discussed U.S. interest in obtaining and retaining prisoners for intelligence gathering put pressure on Canada to turn over detainees to the U.S.¹⁹ Thirdly, Canada did not have the capability to do otherwise.²⁰ The fielding of a battle group, national support element, and operational headquarters strained the Canadian forces throughout the war years. A capacity to safely and appropriately hold the numbers of detainees taken throughout the duration of the conflict would have required hundreds or more soldiers than the Canadian contribution, as well as specialized skills and training in prison

¹⁶ Stuart Hendin, "Murphy's Law - The Canadian treatment of detainees in Afghanistan: are human rights and international humanitarian law obligations circumvented?" *University of Queensland Law Journal* 26, No 1 (2007): 5.

¹⁷ Marc Gionet, "Canada the Failed Protector: Transfer of Canadian Captured Detainees to Third Parties in Afghanistan," *The Journal of Conflict Studies* 29 (2009): 5-8.

¹⁸ Cordula Droege, "Transfer of detainees: legal framework, non-refoulement, and contemporary challenges," *International Review of the Red Cross* 90, No 1 (2008): 693.

¹⁹ Marc Gionet, "Canada the Failed Protector: Transfer of Canadian Captured Detainees to Third Parties in Afghanistan," 9.

²⁰ *Ibid*, 12.

operations that the Canadian Armed Forces lacked.²¹ There was therefore strong pressure in favour of a transfer policy, at least initially. However, Canada's transfer policy was particularly weak among NATO nations, and has been criticised for the lack of conditions or provisions for the safety of transferred prisoners.²² In fact, initially it relied completely on mere diplomatic assurances, which are considered insufficient to meet international obligations under various conventions.²³

As a result of Canada's detention policy decisions persons captured in Afghanistan by Canadian soldiers were subjected to both the enhanced interrogation techniques of U.S. officials and the less nuanced abuse and torture of the Afghan National Directorate of Security. There followed several high profile challenges to the practice in court and through other semi-judicial government accountability mechanisms, as well as highly publicised criticism and public outcry.²⁴ The tangible outcome of all this criticism is less clear. No individuals were held accountable through criminal convictions, and it is not clear how much this issue affected the fall of the conservative government that allegedly prorogued government in order to disrupt inquiries into the detainee transfer policy.²⁵ Some now argue that the lack of accountability, sustained

²¹ Based on author's assessment of the troops required for the long term internment of between 400 and 700 detainees and the state of the Military Police branch training. For statistics of the number of detainees captured and transferred see Omar Sabry, "Torture of Afghan Detainees: Canada's alleged complicity and the need for a public inquiry," *Canadian Center for Policy Alternatives*, September 2015, 31.

²² Lawrence Hill-Cawthorne, "The Copenhagen Principles on the Handling of Detainees: Implications for the procedural regulation of internment," 496.

²³ Cordula Droege, "Transfer of detainees: legal framework, non-refoulement, and contemporary challenges," 692.

²⁴ Omar Sabry, "Torture of Afghan Detainees: Canada's alleged complicity and the need for a public inquiry," 6, 34, 39.

²⁵ "Haper grilled over prorogation, detainees," *CBC*, March 4, 2010.

through the rejection of new inquiries by the current Trudeau administration, make a future scandal more likely.²⁶

CURRENT OPERATING ENVIRONMENT

Operations are carried out in not just a physical environment, but also a human and legal environment. These domains are much more dynamic than the physical milieu and are subject to both gradual and sudden changes based on trends, actors, and legal decisions. They also have the greatest impact on detention operations. Both dimensions can be characterized by increasing ambiguity, as well as the tension between reigning in that ambiguity and exploiting it. The discussion above suggests that detention policy suffers in the face of ambiguity, and the consequences include abuse, torture, and scandal. For reasons of scope this paper will focus on two emerging security threats: fighters without borders and hybrid warfare – categories not neatly covered in the body of international law on detention during armed conflict. It will examine the state of international law emerging on the subject of detention in non-international armed conflict, and the lack of “bright line rules” to guide the development of detention policies and structures.²⁷

Fighters without borders are not new to the global war on terror. The September 11 attackers, after all, came from a number of nations and their plan depended on taking their grievances beyond the region of the Middle East.²⁸ Still, the recent conflict in Syria and the emergence of ISIL saw a marked increase in fighters leaving their homes to fight,

²⁶ Peggy Mason, “Re: Need for commission of inquiry on Canada’s Transfer of Afghan Detainees to Torture” Rideau Institute, June 7, 2016.

²⁷ Bruce Oswald and Thomas Winkler, “The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations,” 131.

²⁸ United States, National Commission on Terror Attacks Against the United States, *The 9/11 Commission Report*, report prepared by Thomas H. Kean. Washington: U.S., 2013.

causing significant tension in western legal systems.²⁹ They include transnational terrorists and foreign partisans of a conflict and in an internationalized armed conflict can include the citizens of intervention and assistance forces. The primary problem that fighters without borders pose to detention policies is one of categorization. In a multi-national operation, the capturing party must do more than determine whether or not this fighter is a legitimate combatant. The detainee's citizenship, level of involvement, group affiliation must all be considered in order to determine not just the capturing state's interest, but partner interests in the prisoner. Detention policy on transfers, prosecutions, and release follow directly from this activity of categorizing, and decisions made will differ among any or all of these categories. The possibility of a foreign fighter having a Canadian passport will require theatre detainee policy to address whether or not Canada will demand transfer of that detainee to Canadian custody and jurisdiction, or conversely to comply with equivalent demands from partner forces.

On the other hand, hybrid warfare threatens to drag this level of ambiguity and uncertainty to traditional international armed conflicts between states. The goal of hybrid warfare is to compete in multiple domains, incorporating non-state actors or behaving covertly as non-state actors, synchronized with traditional modes of war in order to disrupt the enemy and gain advantage. This means that the confidence that contributing states have shown towards the completeness of international humanitarian law in governing traditional international armed conflict may be misplaced.³⁰ Overconfidence in old structures without accounting for the nuanced difficulties of detaining non-state

²⁹ Oldrich Bures, "EU's response to foreign fighters: new threat, old challenges?," *Terrorism and Political Violence* (2018): 8, doi: 10.1080/09546553.2017.1404456.

³⁰ Bruce Oswald and Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations," 141.

actors could offer opportunities for exploitation by an adversary well versed in principles of hybrid warfare. This effect will stack with the type of error and breakdown in discipline that comes with increased pressure on combat and detention systems. An adversary can exploit or invent stories of abuse, or simply support challenges to the legitimacy of detention operations, providing a significant advantage in the information domain. Effective hybrid warfare uses physical effects, including the effects of covert and arm's length non-state actors, with information and moral effects in order to attack the will and support for intervention, both back home and in the international community, from which the west derives their legitimacy for military action. This is not to suggest that any legal challenge to a detention regime is the result of enemy lawfare, but that an understanding of hybrid threats tells us to expect lawfare attacks.³¹

Legal challenges should be expected generally, as ‘the black-letter rules of the venerable Geneva Convention do not provide clear guidance for states engaged in conflicts with non-state actors.’³² While conflict has long been governed by international humanitarian law, it was written in a way that limited its applicability outside of traditional state-on-state conflicts. Where there are practices and norms governing non-international armed conflicts, they do not have the consistency and authority of the hard rules contained in either humanitarian or human rights regimes.³³ Several attempts were made through the ‘Copenhagen process’ to address these gaps in law, and provide non-

³¹ Frans Osinga and Mark Roorda, “From Douhet to Drones, Air Warfare, and the Evolution of Targeting,” in *Targeting: The Challenges of Modern Warfare*, eds. Paul Ducheine, Michael Schmitt, and Frans Osinga (The Hague: Asser Press, 2016), 58.

³² John Belliger and Vijay Padmanabhan, “Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law,” *The American Journal of International Law* 105 (2011): 202.

³³ Bruce Oswald and Thomas Winkler, ““The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations,” 131.

binding standards for detention operations in non-international (but internationalized) armed conflict.³⁴ However, over the course of the process, which consisted of a series of conferences with mainly state representatives and limited non-governmental organization advice, the scope and practice of the ‘rules’ for detention operations in non-international armed conflict were watered down to a more limited number of principles – retaining some of the ambiguity desired by participating states.³⁵ The process therefore fell short of protecting western states from future challenges.

There are three broad basis for challenge, based on the ambiguity of law in non-international armed conflicts: the legitimacy of detention, the legality of transfers to other parties, and the general applicability of human rights laws. In humanitarian law there are two categories of detention: combatants and civilian detention.³⁶ However, in non-international armed conflict with non-state actors, there is debate on whether or not they should be considered as protected persons under the Fourth Geneva Convention, meant to protect civilian detainees.³⁷ This could create an illogical position where a non-state fighter, in spite of engaging consistently in combat operations, could be prematurely released or granted greater rights of review than a fighter loyal to a recognized party to the conflict.³⁸ What emerges from this line of thought is a new category of combatant who could be either a security or criminal detainee, for whom repatriation responsibilities are unclear, and whose detention could last indefinitely – as the global war on terror has no definite end. This is inherently an ambiguous category of detainee that gives states the

³⁴ *Ibid*, 142.

³⁵ *Ibid*, 145.

³⁶ Marc Gionet, “Canada the Failed Protector: Transfer of Canadian Captured Detainees to Third Parties in Afghanistan,” 11.

³⁷ John Belliger and Vijay Padmanabhan, “Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law,” 215.

³⁸ *Ibid*, 215-217.

discretion to categorise any given captured fighter based on their interest in him/her. Suggested solutions to this problem are often impractical or undesirable within the purpose of the mission. For example, one such suggestion is to require intent to prosecute before detention can be legal; an impracticality given the difficult reality of evidence collection in an active conflict zone, never mind establishing when the intent to prosecute must be present (before or after a sufficiently strong case has been built).³⁹ Non-state actors with citizenship with a belligerent or co-belligerent state add an extra complication, as they are excluded explicitly from protected person status.⁴⁰ Fighters without borders therefore, will fall into a legal void where they cannot be granted protected person (civilian) status, nor prisoner of war status under current humanitarian law regimes. From a realist perspective, this will never be a restraint on states detaining these individuals, but will muddy state obligations towards them.

Excluding short duration ‘detain and release’ operations, such as cordons to search or identify persons in the battle space, we now have classic combatant and civilian ‘security’ detentions, detentions of criminals, and non-state actors who bleed into each of these categories. There still remains a gap in the law on when and in what circumstances detention can be justified. It is clear when a person has committed an act, criminal or military, against a belligerent party during a recognized armed conflict. However, in peace support operations, or when attempting to disrupt non-state networks, proactive detention of both criminal and security detainees will be less clear. Under most western domestic law, and human rights law, there is no ability to detain because of the

³⁹ *Ibid*, 211.

⁴⁰ *Ibid*, 216.

membership status of an individual, as there is in humanitarian law.⁴¹ As a result, authorization for detention will be read into United Nations resolutions or self-defence laws, without any clarity or specificity on the circumstances in which they may be justified.⁴² It is not at all clear to what extent the detention of mere supporters, or inactive fighters may be authorized, and what legal regimes will govern their transfer and release.

The transfer of detainees during armed conflict suffers from similar ambiguity in law. Many legal regimes governing detention prohibit transfers in some circumstances. The Geneva Conventions outright prohibit the forced transfer of protected persons from a territory, with limited exceptions based on principles of necessity.⁴³ Additionally, the principle of non-refoulement is present in both humanitarian and human rights law, as well as international refugee law and most western domestic legal systems.⁴⁴ In short, “no [state] shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁵ Nonetheless, transfers are a feature of armed conflicts, and are poorly governed. Transfers, as with detentions, can be read into Security Council authorizations, with a smaller degree of ambiguity.⁴⁶ To deny the ability to states to transfer to a host nation during a peace support or internationalized armed conflict would be to ‘frustrate

⁴¹ Lawrence Hill-Cawthorne, “The Copenhagen Principles on the Handling of Detainees: Implications for the procedural regulation of internment,” 486.

⁴² Bruce Oswald, “Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles,” *International Review of the Red Cross* 95 (2013): 714-716. doi: 10.1017/S1816383113000659

⁴³ John Bellinger and Vijay Padmanabhan, “Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law,” 237.

⁴⁴ Jeffrey Fisher, “Detainee Transfers after MUNAF: executive deference and the convention against torture,” *Georgia Law Review* 43 (2009): 960.

⁴⁵ *Ibid*, 960.

⁴⁶ Cordula Droegge, “Transfer of detainees: legal framework, non-refoulement, and contemporary challenges,” 691.

the achievement of the objectives [...] [and the] mandate.”⁴⁷ Many states deny the applicability of non-refoulement within a state on grounds of sovereignty.⁴⁸ Where transfers can be justified, it does not relieve the transferring state of its obligations in the Convention Against Torture, and therefore the need to have provisions to ensure that detainees are neither mistreated or transferred to a third party; with provisions to demand the return of transferred detainees if required.⁴⁹ A major criticism of Canada in Afghanistan was the initial lack of any such provisions.⁵⁰ However, as discussed above, diplomatic assurances are insufficient protection, and even provisions of return are meaningless without the capability to enforce them.⁵¹ The International Criminal Court has assigned responsibility for transfers where the duty to protect was ignored, but did not address how far that responsibility extended where there is a lack of capacity to resist transfer.⁵² There is also ambivalence in the law about how long such a duty lasts. It is impractical to assert an unending responsibility, but neither does linking it to post transfer convictions fully solve the problem, as not all security detainees will be tried, never mind convicted. Linking transfer to conviction, particularly for crimes of terror or human rights abuse, is tricky as there may be multiple appropriate jurisdictions with an interest.⁵³ This provides space to delay transfers while a state ‘jurisdiction’ shops for a court that will

⁴⁷ *Ibid*, 688.

⁴⁸ John Belliger and Vijay Padmanabhan, “Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law,” 237.

⁴⁹ Lawrence Hill-Cawthorne, “The Copenhagen Principles on the Handling of Detainees: Implications for the procedural regulation of internment,” 496.

⁵⁰ Marc Gionet, “Canada the Failed Protector: Transfer of Canadian Captured Detainees to Third Parties in Afghanistan,” 9-12.

⁵¹ Lawrence Hill-Cawthorne, “The Copenhagen Principles on the Handling of Detainees: Implications for the procedural regulation of internment,” 496.

⁵² Marco Sassoli and Marie-Louise Tougas, “International law issues raised by the transfer of detainees by Canadian Forces in Afghanistan,” 1006.

⁵³ Bruce Oswald, “The Copenhagen Principles, International Military Operations and Detentions,” *Journal of International Peacekeeping* 17 (2013): 127, doi: 10.1163/18754112-1702004

better align with its goals, an outcomes that could offend principles of fundamental justice.

Although humanitarian law addresses humane treatment, it does not address ideas of justice, this is the sphere of human rights law. Although there are some states that assert the exclusive applicability of humanitarian law on the battle field,⁵⁴ the paper will only briefly touch on one controversial aspect of the applicability of human rights law, because many aspects of the applicability of human rights laws remain uncontroversial such as the prohibition of mistreatment or discrimination.⁵⁵ Still uncertain is *how much* due process is required when dealing with detainees in non-international armed conflict. On the high end, European human rights law and the International Covenant on Civil and Political Rights require judicial review.⁵⁶ Humanitarian law, on the other hand, permits in some circumstances administrative review of detention under less stringent conditions.⁵⁷ Within that there is significant ambivalence and scope for discretion in the composition, independence, authorities, and competence of the administrative review process.⁵⁸ In practice, the reviews afforded to detainees in Afghanistan and Iraq were of the less stringent type, particularly early in the conflict.⁵⁹ A compromise solution, such as that articulated in the U.S. Boumediene case is unlikely to satisfy any party, and will still allow for challenge, but is most likely to balance practical considerations with

⁵⁴ Jeff Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy," *The Army Lawyer* 6 (2010): 37.

⁵⁵ Stuart Hendin, "Murphy's Law - The Canadian treatment of detainees in afghanistan: are human rights and international humanitarian law obligations circumvented?" 9-10.

⁵⁶ John Belliger and Vijay Padmanabhan, "Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law," 210.

⁵⁷ *Ibid*, 204.

⁵⁸ Bruce Oswald and Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations," 145.

⁵⁹ Jeff Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy," 16.

defensibility.⁶⁰ SOPs and practice should ensure that essential procedural obligations are articulated to military commanders to reduce ambiguity and prevent abuse and the potential for indefinite detentions without review, whether or not they have the force of law.⁶¹ Both the Copenhagen process and recent court cases in western democracies are asserting the need to include fundamental aspects of human rights law in detention policies and practice.⁶²

CANADA IN PRACTICE

Since the black eye of Abu Ghraib and a change in administrations, much has changed in the way the U.S. conducts detention operations. An examination of these changes will help in the analysis of what has changed in Canadian policy. Even while the conflict was ongoing, there was a change in the administrative reviews that governed detainee boards. That change trended towards an evolution of increasing procedural rights and due process.⁶³ The competence of the board was enhanced through expanded participation by legal experts, and a reduced role for military intelligence. Representation was provided for detainees, and access to the process was granted.⁶⁴ The U.S. under the Obama administration also walked back the structure and rules of their detention operations to comply with Army Field Manual 2-22 governing detention, which

⁶⁰ Robert Chesney, "Suspension clause – military commission act – detainee treatment act – jurisdiction to review military detention of noncitizens held at Guantanamo Bay, Cuba," *The American Journal of International Law*, 103, No 4 (2008): 854.

⁶¹ Cordula Droege, "Transfer of detainees: legal framework, non-refoulement, and contemporary challenges," 679.

⁶² Bruce Oswald and Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations," 139.

⁶³ Jeff Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy," 16-18.

⁶⁴ *Ibid*, 16.

eliminated most of the criticised enhanced interrogation techniques.⁶⁵ Such progress is not perfect, nor does it have the permanence of law, and could be changed subject to the direction of the current or future administrations. The scope of potential change will be limited by the intervention of the U.S. federal courts in the evaluating detention regimes, and mandating the applicability of domestic due processes to overseas operations.⁶⁶ To date, in spite of significant divergence in the tone and rhetoric of the Obama and Trump administrations, the military institutions have retained the more restrictive and disciplined detention structures. Even under the Obama administration, however, the U.S. did stop short of accepting the application of human rights laws to the battlefield, particularly to non-state actors such as Al Qaeda.⁶⁷ The existing structures will also still be subject to the personalities and ‘intent’ of lower level commanders that can undermine procedural protections by exploiting legal ambiguity. After all, torture and degrading treatment was already prohibited under army field manuals during the early global war on terror, but commanders issued conflicting directions based on their interpretation of executive priorities.⁶⁸ Manuals also continue to sow confusion by emphasizing the consequences for disobeying lawful orders over the consequences of conviction for complicity in war crimes.⁶⁹ Still, the strategic effect and accountability for Abu Ghraib had significant

⁶⁵ Adam Lankford, “Assessing the Obama Standard for Interrogations: An Analysis of Army Field Manual 2-22.3,” 20.

⁶⁶ Aziz Huq, “The President and the Detainees,” 525.

⁶⁷ John Belligner and Vijay Padmanabhan, “Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law,” 24.

⁶⁸ Adam Lankford, “Assessing the Obama Standard for Interrogations: An Analysis of Army Field Manual 2-22.3,” 24.

⁶⁹ *Ibid*, 28.

effects on military police training, and shapes the way U.S. forces prepare for detention operations.⁷⁰

A fulsome analysis of Canada's response on the other hand will be more difficult. The Canadian Armed Forces doctrine for detention operations has not undergone a change since the Afghanistan conflict.⁷¹ Throughout the conflict in Afghanistan, the Canadian detainee boards more closely resembled the early U.S. boards with no representation for the detained, limited participation of key staff and the commander, and few procedural protections.⁷² The only extant and binding procedures for holding such boards are contained in an annex to the Geneva Convention Act, written in 1991 and integrated into the Queen's Regulations and Orders of the Canadian Armed Forces.⁷³ These are very much focused on the limited scope of humanitarian law, and are not a definitive guide to answer the contemporary challenges of fighters without borders, hybrid warfare, and non-international armed conflict.

Due to the classified nature of such policies, this paper will not discuss the details of existing detention policies and procedures of current missions. However, they remain ad-hoc and do not serve to guide the decision making of tactical commanders and staff on operations.⁷⁴ Rather than being solidly based on doctrine, individual detention decisions on these operations are likely to be circumstantial and made at the operational level. While this is likely to offer sufficient protection so long as Canada participates in military

⁷⁰ Based on author's participation in U.S. National Guard Military Police detention exercises, and discussion with tactical Military Police leaders within the U.S. armed services.

⁷¹ Department of National Defence. Canadian Forces Joint Doctrine 3-13 Prisoners of War and Detainees. Ottawa: Chief of the Defence Staff, 2004.

⁷² Based on author's experience participating on such boards as a staff officer.

⁷³ Prisoner of War Status Determination Regulations. SOR/91-134 enacted under section 8 of the Geneva Convention Act, 1991.

⁷⁴ Author's recent experience on operations in Kuwait and Iraq in 2017-2018.

interventions unlikely to result in many detentions, future more combat oriented deployments will need much more robust standard operating procedures.⁷⁵ This is one of the principles of the Copenhagen process, which Canada has accepted,⁷⁶ and hopefully these will form the basis of drafting such robust procedures.

Paper procedures, however, are of no value without appropriate training and investment by primary force generators. Features of Canada's method of generating missions, with mandated troop caps and lengthy parliamentary procedures for adjustments, make it unlikely that sufficient resources will be available for detention operations in any such future intervention. Canada is therefore likely to default back to the transfer schemes developed during Afghanistan. Training, as well, has not kept pace with developments in the U.S.⁷⁷ Few Canadian military police receive robust training in operating detention facilities, with common training limited to basic Law of Armed Conflict and outdated doctrine. The detention center of excellence is a service prison focused on domestic internment of service prisoners, and does not offer guidance, procedure, or training on detention operations in a complex multi-domain operating environment. Finally, there have been no efforts within Canada to align military doctrine and practice with other government departments.⁷⁸ Short of a pressing need (a contemporary detention crisis on operation), there is little prospect in exercising or

⁷⁵ Low risk of taking problematic detainees is not no risk, and there always exists the possibility in the course of self-defence of taking a detainee. Given the low frequency, these cases will be unlikely to overwhelm higher (operational) levels of Command.

⁷⁶ Bruce Oswald and Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations," 132.

⁷⁷ Author's experience within the Military Police training system, and on joint planning boards over the last 5 years, 2013-2018.

⁷⁸ J.P.S. McKenzie, "Struggling with outdated rules: international humanitarian law and its impact on Canadian detainee policy." *MDS diss.*, Canadian Forces College, 2011.

validating a contemporary and robust military detention policy with other government department participation; at which point, it may well be too late to avoid strategic failure.

CONCLUSION

Canada has not sufficiently adapted to the lessons of the Afghan transfer scandals and the changing operational environment that includes new threats that promise to make future detention operations more complicated and fraught with strategic dangers. Nor is Canada unique in struggling to balance participation in internationalized armed conflict and peace support operations with the capability to fulfill all the requirements of international humanitarian and human rights laws.⁷⁹ Because of scope the paper limited its comparison to the U.S. experience with scandal and change, but many NATO countries could have served as a basis for comparison.⁸⁰ For the same reason, the paper avoided delving into contemporary debates on the applicability of domestic law, including the Canadian Charter to international detention operations. Given the impacts of both Canadian complicity in the rendition of Maher Arar⁸¹ and Omar Khadr,⁸² this issue cannot be ignored by military planners: however, both of these cases fell within the structures policies of other government departments – re-emphasizing the need for greater inter-agency cooperation and discussion. The Copenhagen process offers a starting point for Canada to examine its preparedness for contemporary detention operations. Canada welcomed the principles laid out in this process, including the requirement to build standard operating procedures that take into account the other

⁷⁹ Bruce Oswald and Thomas Winkler, “The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations,” 132.

⁸⁰ *Ibid*, 132.

⁸¹ World Report, “Canadian soldiers and doctors face torture allegations.” *The Lancet*, April 28, 2007, 1419.

⁸² Marco Sassoli and Marie-Louise Tougas, “International law issues raised by the transfer of detainees by Canadian Forces in Afghanistan,” 986.

principles.⁸³ This should be done in a comprehensive, whole of government, approach in order to tackle the cross jurisdictional nature of contemporary challenges: including immigration and citizenship, diplomatic considerations, transnational crime, intelligence and national security concerns, and military necessity. At a minimum, the Canadian Armed Forces should proactively prepare themselves through training and updated internal procedures prior to embarking on higher risk operations such as the provision of a quick reaction force to the United Nations. The consequences of failure go beyond the potential strategic consequences of elections and potential prosecutions: no Canadian military commander should want to be, or have their troops be, implicated, even indirectly, in the violation of human rights. It tarnishes the honour and values of a critical Canadian institution.

⁸³ Bruce Oswald, "The Copenhagen Principles, International Military Operations and Detentions," *Journal of International Peacekeeping* 17 (2013): 123, doi: 10.1163/18754112-1702004

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